

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNY B.,

Plaintiff,

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C19-5731 RAJ

**ORDER REVERSING AND
REMANDING FOR FURTHER
ADMINISTRATIVE
PROCEEDINGS**

Plaintiff seeks review of the denial of her applications for Supplemental Security Income.

Plaintiff contends the ALJ erred by failing to account for all of her severe impairments, rejecting her testimony and three medical sources' opinions, and relying on insufficient vocational expert testimony. Dkt. 12. As discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff is 41 years old, has a high school education, and has worked as a customer service representative, stock clerk, medical assistant, and waitress. Dkt. 8, Admin. Record (AR) 26-27. Plaintiff applied for benefits on November 28, 2016, alleging disability as of September 30, 2016. AR 96-97. Plaintiff's applications were denied initially and on reconsideration. AR

1 95, 109. After the ALJ conducted a hearing in July 2018, the ALJ issued a decision finding
2 Plaintiff not disabled. AR 34-94, 15-28.

3 THE ALJ'S DECISION

4 Utilizing the five-step disability evaluation process,¹ the ALJ found:

5 **Step one:** Plaintiff has not engaged in substantial gainful activity since the November
6 2016 application date.

7 **Step two:** Plaintiff has the following severe impairments: major depressive disorder,
8 generalized anxiety disorder, and migraine headaches.

9 **Step three:** These impairments do not meet or equal the requirements of a listed
10 impairment.²

11 **Residual Functional Capacity:** Plaintiff can perform light work with no exposure to
12 vibration or hazards, occasionally balancing or climbing ramps or stairs and never
13 climbing ropes, ladders, or scaffolds. She can perform simple, routine tasks but no team
14 tasks, and can have occasional contact with coworkers and no contact with the public.

15 **Step four:** Plaintiff cannot perform past relevant work.

16 **Step five:** As there are jobs that exist in significant numbers in the national economy that
17 Plaintiff can perform, she is not disabled.

18 AR 17-28. The Appeals Council denied Plaintiff's request for review, making the ALJ's
19 decision the Commissioner's final decision. AR 1-3.

20 DISCUSSION

21 This Court may set aside the Commissioner's denial of Social Security benefits only if
22 the ALJ's decision is based on legal error or not supported by substantial evidence in the record
23 as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017).

24 A. The ALJ Erred in Discounting Plaintiff's Testimony

25 In a January 2017 Function Report, Plaintiff stated her memory was "bad/problematic,"

26 ¹ 20 C.F.R. § 416.920.

27 ² 20 C.F.R. Part 404, Subpart P, Appendix 1.
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1 specifically that her “short term memory is gone.” AR 255, 259. She is “easily distracted.” AR
2 260. At the July 2018 hearing, Plaintiff testified she has difficulty concentrating. AR 69.
3 Anxiety and depression cause word-finding problems, tiredness, and crying. AR 61. Plaintiff
4 testified she sleeps excessively and unpredictably. AR 56. About twice a month she has
5 migraines lasting two to three days, requiring her to stay in a dark room. AR 57-58. At those
6 times, her parents, sister, or great aunt will care for her children. AR 58. Plaintiff has a hand
7 tremor. AR 59. She can stand or walk about 15 to 20 minutes before needing to rest for five
8 minutes. AR 69, 75.

9 Where, as here, an ALJ determines a claimant has presented objective medical evidence
10 establishing underlying impairments that could cause the symptoms alleged, and there is no
11 affirmative evidence of malingering, the ALJ can only discount the claimant’s testimony as to
12 symptom severity by providing “specific, clear, and convincing” reasons supported by
13 substantial evidence. *Trevizo*, 871 F.3d at 678. The ALJ discounted Plaintiff’s testimony based
14 on inconsistency with the record, inconsistency with her activities, improvement with treatment,
15 and lack of supporting clinical findings. AR 22-24.

16 **1. Inconsistency with the Record**

17 The ALJ erred by discounting Plaintiff’s testimony on the grounds that her testimony of
18 losing jobs due to impairment-related mistakes was inconsistent with her statement to a therapist
19 that her husband had gotten her fired. AR 22. The ALJ mischaracterized the record. In 2016
20 Plaintiff told a therapist that her marriage “after high school … ended really quickly” because
21 her husband “was psychologically abusive. He got [her] fired from [her] jobs so he could keep
22 [her] at home.” AR 392. At the 2018 hearing Plaintiff testified that she lost jobs in 2013 and
23 later, when she was at least 34 years old, due to issues such as “mixing up words and numbers”

1 and other mistakes. AR 50-52. Plaintiff's statement to her therapist referred to a brief period
2 after high school. Plaintiff's hearing testimony referred to when Plaintiff was age 34 or older.
3 The ALJ's interpretation that these two statements referred to the same period of time was not
4 rational. *Cf. Burch v. Barnhart*, 400 F.3d 676, 680-81 (9th Cir. 2005) (when evidence is
5 susceptible to more than one interpretation, ALJ's interpretation must be upheld if rational).
6 Thus, the statements were not inconsistent and provided no reason for discounting Plaintiff's
7 testimony. The Commissioner argues, despite the lack of any inconsistency, Plaintiff's "poor
8 earnings history and questions regarding her reasons for not working" provided a basis to
9 discount her testimony. Dkt. 13 at 4. The only question regarding Plaintiff's reason for not
10 working arises from the ALJ's mischaracterization of the record, which cannot provide a basis
11 for rejecting evidence. *See Reddick v. Chater*, 157 F.3d 715, 722-23 (9th Cir. 1998) (ALJ's
12 decision was not supported by substantial evidence where his "paraphrasing of record material is
13 not entirely accurate regarding the content or tone of the record"). And poor earnings history is
14 an illegitimate *post hoc* reason, as the ALJ made no finding of poor earnings history and did not
15 rely on any such reason. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir.
16 1995) (court reviews ALJ's decision "based on the reasoning and findings offered by the ALJ—
17 not *post hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking").

18 The ALJ discounted Plaintiff's testimony in part because her treating doctor, Rebecca Jo
19 Renn, M.D., noted possible amplification of symptoms. AR 22. In her assessment, Dr. Renn
20 wrote: "Definite depression, though I suspect that she may be amplifying the severity and that
21 much of her distress is due to poor coping and difficult interpersonal situations. So we need to
22 be realistic about how much to expect meds to help." AR 1030. Dr. Renn did not discount
23 Plaintiff's distress, but questioned the cause. The mere fact that an ALJ mentions evidence that

1 could suggest malingering, but does not affirmatively find that the evidence shows the claimant
2 was malingering, cannot support rejection of the claimant’s testimony. *See Robbins v. Soc. Sec.*
3 *Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) (“[U]nless an ALJ makes a finding of malingering
4 based on affirmative evidence thereof, he or she may only find an applicant not credible by
5 making specific findings as to credibility and stating clear and convincing reasons for each.”).
6 The ALJ did not make a finding that Plaintiff was malingering; she stated only that Dr. Renn
7 noted Plaintiff “appeared to be possibly amplifying the severity of her symptoms.” AR 22. This
8 vague statement did not relieve the ALJ of her obligation to provide clear and convincing
9 reasons for rejecting Plaintiff’s testimony.

10 The ALJ found Plaintiff’s ability “to remember and provide detailed information during
11 her hearing, which lasted well over an hour,” inconsistent with her “asserted memory issues and
12 inability to pay attention.” AR 22. An ALJ’s observations can be relevant when assessing a
13 claimant’s allegations. *See Han v. Bowen*, 882 F.2d 1453, 1458, n.8 (9th Cir. 1989) (no error
14 where ALJ made specific findings based on his observation of the claimant). But here,
15 Plaintiff’s behavior at her hearing did not contradict her allegations. *Cf. Reddick*, 157 F.3d at
16 722 (“Only if the level of activity were inconsistent with Claimant’s claimed limitations would
17 these activities have any bearing on Claimant’s credibility.”). Plaintiff testified to short-term
18 memory problems and easy distractibility. She wrote in her 2017 Function Report that “if
19 someone is explaining something new to me, I lose attention after the 1st sentence.” AR 260.
20 The hearing did not involve short-term memory or new information; rather, it required Plaintiff
21 to remember her longstanding health issues and employment history. And the record reveals
22 nothing distracting during the hearing. The ALJ’s observations did not contradict Plaintiff’s
23 allegations, and thus were not a clear and convincing reason to discount her testimony.

1 Inconsistency with the record was not a clear and convincing reason to discount
2 Plaintiff's testimony.

3 **2. Activities**

4 The ALJ cited Plaintiff's ability to "drive a car, live alone with her two school-aged
5 children, [and] use her smart phone to text, access the internet, call people, view movies, and use
6 its calendar and map applications," as well as her ability to draw, sew, and attend counseling
7 sessions. AR 23.³ Caring for her children included getting them ready and taking them to and
8 from school, helping them with homework, preparing meals, shopping for groceries, doing
9 laundry, and sweeping. *Id.* An ALJ may discount a claimant's testimony based on daily
10 activities that either contradict her testimony or that meet the threshold for transferable work
11 skills. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). The ALJ did not explain how these
12 activities contradict any of Plaintiff's testimony, and no contradiction is apparent. The
13 Commissioner also fails to elucidate the matter, other than an unexplained and unsupported
14 assertion that the activities "provided a basis to question the reliability of Plaintiff's reported
15 symptoms." Dkt. 13 at 7. The ability to carry out some basic activities does not undermine
16 claims of disabling impairments. "The Social Security Act does not require that claimants be
17 utterly incapacitated to be eligible for benefits...." *Smolen v. Chater*, 80 F.3d 1273, 1284 n. 7
18 (9th Cir. 1996). Plaintiff's activities were not a clear and convincing reason to discount her
19 testimony.

20 **3. Improvement with Treatment**

21 The ALJ cited treatment notes showing Plaintiff "making progress," feeling "happier," or

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23 ³ The ALJ also cited Plaintiff testifying before the legislature, which lasted a minute and a half at most.
AR 23, 71. The Commissioner does not mention this activity, apparently conceding that it does not
contradict Plaintiff's testimony or show she can work. *See* Dkt. 13 at 6-7.

1 “doing good” with mental health therapy. AR 23 (citing AR 1039, 1008, 815-17). Evidence that
2 treatment returned a claimant “close to the level of function they had before they developed
3 symptoms or signs of their mental disorders’ … can undermine a claim of disability.”

4 *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017) (quoting 20 C.F.R. Pt. 404, Subpt. P,
5 App’x 1, § 12.00H (2014)). However, ““doing well for the purposes of a treatment program has
6 no necessary relation to a claimant’s ability to work or to her work-related functional capacity.””
7 *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014) (quoting *Hutsell v. Massanari*, 259 F.3d
8 707, 712 (8th Cir. 2001)). These vague statements of mild improvement with therapy do not
9 show Plaintiff can work or otherwise undermine her testimony.

10 The ALJ also cited February 2016 treatment notes showing that, after a November 2015
11 botulinum toxin injection, Plaintiff’s migraines decreased from an average of five days per week
12 to three migraines in three months, each lasting 9 to 48 hours. AR 322; AR 24. July 2015 and
13 February 2016 injections produced similar results. AR 325, 338. After May 2016, February
14 2017, and May 2017 injections, “migraine days decreased” by an unspecified amount. AR 353,
15 833, 842. Plaintiff points to August 2017 treatment notes documenting daily migraines. AR
16 847. A September 2017 injection decreased migraine days to “average 2 days per month for the
17 first 1.5 month.” AR 861. However, November 2017 and January 2018 injections “did not help
18 reduce migraine days much,” and Plaintiff had about 25 migraine days in three months. AR 870,
19 879. The ALJ’s finding that Plaintiff’s migraines were well controlled finds some support before
20 late 2017. However, after November 2017, this finding is contradicted by the record. Plaintiff’s
21 testimony at the July 2018 hearing that she gets migraines about twice a month for two to three
22 days at a time was not inconsistent with the contemporaneous medical record. AR 57. The
23 earlier improvement does not contradict Plaintiff’s testimony, because Plaintiff did not testify

1 about the earlier period.

2 Improvement with treatment was not a clear and convincing reason to discount Plaintiff's
3 testimony.

4 **4. Lack of Supporting Medical Evidence**

5 The ALJ cited clinical findings of good short-term (as well as long-term) memory, which
6 contradict Plaintiff's claims of poor short-term memory. AR 23 (citing AR 397); *see also* AR
7 420, 424, 430, 434, 440, 445, 450 (all state "Short and long-term memory intact."). *See*
8 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction
9 with the medical record is a sufficient basis for rejecting a claimant's subjective testimony.").

10 Regarding other symptoms, however, the ALJ cited various normal clinical findings, such
11 as average intellectual functioning and normal orientation and insight, that do not contradict
12 Plaintiff's testimony. AR 23-24. And a mere lack of corroborating medical evidence is not
13 sufficient to discount a claimant's testimony. *Burch*, 400 F.3d at 681 ("lack of medical evidence
14 cannot form the sole basis for discounting [symptom] testimony").

15 The ALJ also found Plaintiff's providers "ruled out obstructive sleep apnea [and] have
16 been unable to find an etiology" for her sleep issues, but failed to explain the relevance of this
17 finding. AR 24 (citing AR 1014). A sleep study determined Plaintiff's "sleep architecture was
18 abnormal" and did not contradict or undermine Plaintiff's testimony. AR 1014.

19 The ALJ also noted a provider's assessment that Plaintiff's chronic pain "may be
20 psychological in nature." AR 567. Nevertheless, Social Security benefits are available for
21 impairments that prevent work, whether "physical or mental." 20 C.F.R. § 416.905(a). This
22 does not contradict or undermine Plaintiff's testimony.

23 Contradiction by medical evidence was a clear and convincing reason to discount

1 Plaintiff's claim of memory problems. Regarding her other symptoms, lack of supporting
2 medical evidence was not an adequate reason to discount Plaintiff's testimony and the ALJ erred
3 by discounting her testimony without a clear and convincing reason.

4 **B. Medical Opinions**

5 An examining physician's opinion is generally entitled to greater weight than a
6 nonexamining physician's opinion. *Garrison*, 759 F.3d at 1012. An ALJ may only reject the
7 contradicted opinion of an examining doctor by giving "specific and legitimate" reasons. *Revels*
8 *v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017). An ALJ may reject the opinion of a non-
9 acceptable medical source, such as a therapist, by giving reasons germane to the opinion.
10 *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014).

11 **1. The ALJ Erred in Discounting the Opinions of Terilee Wingate, Ph.D.**

12 Dr. Wingate examined Plaintiff in September 2017 and opined that her major depressive
13 disorder, generalized anxiety disorder, and Cluster B personality traits caused marked limitations
14 in maintaining punctual attendance, maintaining appropriate behavior, and completing a normal
15 workday and workweek. AR 600-01. Remaining limitations were mild or moderate. *Id.* The
16 ALJ gave great weight to the mild to moderate limitations, but rejected the marked limitations as
17 based on Plaintiff's discredited self-reports. AR 26.

18 An ALJ may discount a medical opinion where it is "based 'to a large extent' on an
19 applicant's self-reports and not on clinical evidence, and the ALJ finds the applicant not
20 credible...." *Ghanim*, 763 F.3d at 1162 (quoting *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th
21 Cir. 2008)). Here, the ALJ erred in finding Plaintiff not credible. In addition, Dr. Wingate
22 provided clinical evidence, documenting abnormalities in mood, affect, concentration, and
23 abstract thought. AR 602. Because the ALJ erred in discounting Plaintiff's self-reports and did

1 not address Dr. Wingate's clinical findings, reliance on Plaintiff's self-reports was not a specific
2 and legitimate reason to discount Dr. Wingate's opinions. On remand, the ALJ should
3 reconsider Dr. Wingate's opined marked limitations.⁴

4 Plaintiff contends Dr. Wingate's opined moderate limitations should lead to a finding of
5 disability because a vocational expert testified that a person who was off-task more than 10% of
6 the workday could not maintain competitive employment. Dkt. 12 at 7 (citing AR 91). Plaintiff
7 does not explain how Dr. Wingate's opined moderate limitations in following detailed
8 instructions, learning new tasks, performing routine tasks without special supervision, adapting
9 to changes, asking for assistance, communicating, or goal-setting would establish more than 10%
10 off-task time. *See* AR 600-601.

11 **2. The ALJ Did Not Err in Discounting the Opinions of Michelle Sullivan,
12 ARNP**

13 In November 2016, treating therapist Ms. Sullivan opined that because Plaintiff was
14 undergoing an "acute flare up of anxiety and depression currently" she was limited to one to ten
15 hours per week of working, looking for work, or preparing for work. AR 368. Ms. Sullivan
16 opined the limitation would last 12 weeks.⁵ AR 369.

17 The ALJ gave Ms. Sullivan's opinions little weight because they were unsupported by

18 _____
19 ⁴ The parties address reasons the ALJ gave to *accept* Dr. Wingate's mild to moderate limitations. Dkt. 12
20 at 6; Dkt. 13 at 8-9. These are not relevant to the ALJ's given reasons to reject Dr. Wingate's marked
21 limitations, and thus the Court need not address them further.

22 ⁵ Because Ms. Sullivan's opined limitations were temporary, the Commissioner argues any error in
23 rejecting them was harmless because they were not significant probative evidence that the ALJ was
24 required to address. Dkt. 13 at 11; *see Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (An
25 ALJ "need not discuss *all* evidence presented to her. Rather, she must explain why 'significant probative
26 evidence has been rejected.'" (alteration in original) (quoting *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir.
27 1981)). Ms. Sullivan's opinions, as Plaintiff's treating provider, are significant probative evidence. While
28 the temporary nature of Ms. Sullivan's opinions would be relevant to evaluating her opinions, the ALJ did
29 not raise it and thus the Commissioner's argument is a *post hoc* analysis on which the Court cannot rely.
30 *Bray*, 554 F.3d at 1225.

1 records or any “functional analysis” and were inconsistent with the record, including Plaintiff’s
2 “demonstrated functioning.” AR 25. While the other reasons were erroneous, conflict with
3 Plaintiff’s activities was a germane reason to discount Ms. Sullivan’s opinions.

4 An ALJ need not accept a medical opinion that is “brief, conclusory, and inadequately
5 supported by clinical findings.” *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).
6 However, because Ms. Sullivan was a treating provider, the ALJ was required to consider her
7 treatment notes in conjunction with her opinions. *See Garrison*, 759 F.3d at 1013 (error to reject
8 “opinions expressed in check-box form [that] were based on significant experience with [the
9 claimant] and supported by numerous records”). The ALJ did not do so. Plaintiff cites October
10 2016 treatment notes documenting “recent life stressors causing depression and anxiety to flare
11 up.” AR 425; *see also* AR 426 (recent job loss causing “passive suicidal thoughts,”
12 “hopelessness and trouble functioning”), 430 (increasing medication dosage).⁶ The ALJ erred by
13 failing to address whether these records were sufficient to support Ms. Sullivan’s opined
14 limitations.

15 The error is harmless, however, because the ALJ also discounted Ms. Sullivan’s opinions
16 as inconsistent with Plaintiff’s demonstrated functioning, including getting her children ready
17 and taking them to and from school, helping them with homework, grocery shopping, preparing
18 meals, housework, and attending frequent therapy sessions. AR 25. The ALJ reasonably
19 inferred these activities together required over ten hours per week and thus conflicted with the
20 opined inability to work no more than ten hours per week. Conflict with Plaintiff’s activities was
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22 _____
23 ⁶ Plaintiff also cites Ms. Sullivan’s April and May 2016 treatment notes showing “low energy” and
increasing medication dosage because symptoms were “not yet at goal.” AR 417, 421. However, these
records do not appear to relate to the “acute flare up” on which Ms. Sullivan’s opinions were based. AR
368.

1 a germane reason to discount Ms. Sullivan's opinions, and thus the ALJ did not err by rejecting
2 them.

3 **3. The ALJ Did Not Harmfully Err in Discounting the Opinions of Ramona
4 Marshall, MA, MHP**

5 In July 2018, treating provider Ms. Marshall wrote a letter opining Plaintiff's post-
6 traumatic stress disorder and major depressive disorder left her "sometimes" unable to perform
7 daily living activities such as "bathing, making appointments, or setting reasonable interpersonal
8 boundaries with others." AR 1039. The ALJ gave these opinions little weight as based on
9 Plaintiff's unreliable self-reports and inconsistent with Plaintiff's demonstrated functioning. AR
10 26.

11 Ms. Marshall also wrote that Plaintiff "credibly reports" difficulty understanding and
12 applying information when her anxiety is aroused by physical or interpersonal problems, and
13 "reports" being fired as a result. AR 1039. The ALJ rejected this statement because it
14 constituted "vouching" for Plaintiff and thus invaded her province as trier of fact. AR 26. This
15 was a germane reason to discount the statement. Ms. Marshall presented the statement not as her
16 medical opinion, but as Plaintiff's statement. The ALJ permissibly disregarded it.

17 Regarding Ms. Marshall's other opinions, Plaintiff has not established the ALJ harmfully
18 erred by rejecting them. The ALJ included extensive mental and social limitations in the RFC,
19 including only simple, routine tasks, no public contact, and limited coworker contact. Plaintiff
20 has not shown Ms. Marshall's opinions require any further limitations.

21 **C. The ALJ Must Reevaluate the Cluster B Diagnosis at Step Two**

22 A medically determinable impairment "must be established by objective medical
23 evidence from an acceptable medical source." 20 C.F.R. §§ 404.1521, 416.921. Impairments
are severe if they "significantly limit" a claimant's "physical or mental ability to do basic work

1 activities.” 20 C.F.R. §§ 404.1522(a), 416.922(a).

2 Plaintiff argues the ALJ erred by excluding Cluster B personality traits, PTSD,
3 fibromyalgia, chronic fatigue syndrome, and hand tremors as severe medically determinable
4 impairments at step two. Dkt. 12 at 7-9.

5 Dr. Wingate, an acceptable medical source, diagnosed Plaintiff with Cluster B personality
6 traits. AR 600. The Commissioner contends the ALJ considered all of Plaintiff’s mental
7 limitations, regardless of which condition caused them. Dkt. 13 at 14. However, because the
8 ALJ erroneously rejected Dr. Wingate’s opinions and did not mention any consideration of the
9 Cluster B diagnosis at step two or any other step, on remand the ALJ should determine whether
10 Cluster B personality traits should be included at step two.

11 Regarding the other conditions, Plaintiff identifies no objective medical evidence from
12 acceptable medical sources that establishes these are severe medically determinable impairments.
13 Plaintiff’s treating therapist, Ms. Marshall, stated Plaintiff “is diagnosed with Posttraumatic
14 Stress Disorder,” but Ms. Marshall is not an acceptable medical source. AR 1039. Treating
15 physician Dr. Renn listed PTSD as well as depression in “Review of Diagnosis,” but her own
16 assessment only listed “depression.” AR 1028, 1030. And Plaintiff’s assertion that her
17 symptoms are consistent with the alleged conditions fails to establish that she actually has the
18 conditions.

19 **D. The ALJ Did Not Harmfully Err at Step Five**

20 The ALJ gave great weight to the opinion of non-examining state agency doctor
21 Christmas Covell, Ph.D., who opined Plaintiff could carry out “simple 1-3 step instructions.”
22 AR 25, 122. The ALJ limited Plaintiff to “simple, routine tasks.” AR 21. Relying on vocational
23 expert testimony, the ALJ found Plaintiff could perform jobs such as small products assembler

1 and inspector. AR 28. Plaintiff contends the ALJ erred because these jobs require a reasoning
2 level of 2, which Plaintiff argues exceeds Dr. Covell's opined limitation. Dkt. 12 at 17.

3 The Court need not address Plaintiff's argument, because the ALJ also found Plaintiff
4 could work as a bakery racker, which only requires a reasoning level of 1. Dictionary of
5 Occupational Titles § 524.687-018, 1991 WL 674400 (G.P.O. 1991). The vocational expert
6 testified that this occupation represented 59,000 jobs in the national economy, which is sufficient
7 to meet the Commissioner's burden at step five. AR 88; *see Gutierrez v. Comm'r of Soc. Sec.*,
8 740 F.3d 519, 529 (9th Cir. 2014) ("25,000 national jobs ... represents a significant number of
9 jobs in" the national economy).

10 **E. Scope of Remand**

11 Plaintiff requests remand for payment of benefits because Dr. Wingate's opinions, if
12 credited as true, establish disability. Dkt. 12 at 18. "This is an erroneous reading of [Ninth
13 Circuit] case law, which requires [the Court] to assess whether there are outstanding issues
14 requiring resolution *before* considering whether to hold that the [improperly discredited
15 evidence] is credible as a matter of law." *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d
16 1090, 1105 (9th Cir. 2014). Neither party has addressed this key matter, but the Court concludes
17 outstanding issues remain. Dr. Wingate's opinions remain contradicted by state agency doctors'
18 opinions, a conflict the ALJ must resolve. *See* AR 24-25. Whether Plaintiff's migraines were
19 effectively treated for some of the relevant period, and to what degree, remains unresolved.

20 Enhancement of the record would be useful and, accordingly, remand for further
21 proceedings is appropriate.

22 **CONCLUSION**

23 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and this
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1 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
2 405(g).

3 On remand, the ALJ should reevaluate Plaintiff's testimony and Dr. Wingate's opinions,
4 reevaluate the Cluster B diagnosis at step two if needed, reassess the RFC as appropriate, and
5 proceed to step five as necessary.

6 DATED this 4th day of March, 2020.

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9 The Honorable Richard A. Jones
10 United States District Judge
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